No. 86-1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

A & E SUPPLY COMPANY, INC.,
Petitioner,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES BELOW

Respondent adopts the statement of the parties below contained in the Petition for Certiorari. However, in accordance with the Rules of the Supreme Court of the United States, respondent identifies the following as affiliated companies:

Nationwide Mutual Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company

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VIRGINIA STATUTES INVOLVED

Virginia Code Section 8.01-681 (Effective October 1, 1984) Decision of Appellate Court.—The appellate court shall affirm the judgment if there is no error therein, and reverse the same, in whole or in part, if erroneous, and enter such judgment as to the court shall seem right and proper and shall render final judgment upon the merits whenever, in the opinion of the court, the facts before it are such as to enable the court to attain the ends of justice. A civil case shall not be remanded for trial *de novo* except when the ends of justice require it, but the appellate court

shall, in the order remanding the case, if it be remanded, designate upon what questions or points a new trial is to be had. (Code 1950, Section 8-493; 1977, c. 617; 1984, c. 703.)

STATEMENT OF THE CASE

The petitioner, A&E Supply Company, Inc., instituted this action by the filing of a Motion for Judgment in the Circuit Court for Buchanan County, Virginia. Petitioner asserted causes of action based upon the breach of an insurance contract and the tort of "bad faith." Respondent, Nationwide Mutual Fire Insurance Company, then removed this case to the United States District Court for the Western District of Virginia.

Thereafter, petitioner moved to amend its Complaint and was permitted to add counts in which petitioner attempted to allege the torts of conversion, fraud, "obtaining property by false pretenses" and "unfair trade practices."[1] However, the District Court refused to permit the amendment to include the torts of trespass, intentional infliction of emotional distress and libel and slander inasmuch as facts underlying such causes of action were

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[1] This amendment was permitted in accordance with the decision of the Virginia Supreme Court in *Kamlar Corp.* v. *Haley*, 224 Va. 699, 299 S.E.2d 514 (1983). *A&E Supply Co. Inc.* v. *Nationwide*, 612 F.Supp. 760, 762 and n.1. (W.D.Va. 1985) (*See* Supp. App. p.9). Petitioner characterizes the holding of *Kamlar* as permitting recovery of punitive damages "for breach of contract where the breach amounts to an independent, willful tort." (Petition for Certiorari at 5, n.5). However, it is quite clear that the "independently willful tort" required by *Kamlar* must actually and independently constitute a separate cause of action. *Kamlar*, 224 Va. at 707, 299 S.E.2d at 517. Facts which merely "amount to," as opposed to actually constituting an independent cause of action in tort, are insufficient. *Id.*

not pled in the original Complaint. *A&E Supply Co., Inc.* v. *Nationwide*, 612 F.Supp. 760, 761-62 (W.D. Va. 1985) (*See* Supp. App. p. 9).

The case proceeded to trial upon the Amended Complaint and, after the District Court directed a verdict for the petitioner on the coverage issue, *A&E Supply* v. *Nationwide*, 612 F.Supp. at 762 (*See* Supp. App. p. 10); *A&E Supply Co., Inc.* v. *Nationwide*, 589 F.Supp. 428, 432 (W.D. Va. 1984) (*See* Supp. App. p. 8), the jury returned verdicts of $221,035.88 on the breach of contract claim and $500,000 for punitive damages only on the various tort claims. *A&E Supply*, 612 F.Supp. at 762 (*See* Supp. App. pp. 10, 11). Respondent moved for directed verdict, followed by motions for judgment notwithstanding the verdict or for a new trial on all counts. *Id.* at 762-63 (See Supp. App. p. 11). The District Court granted judgment notwithstanding the verdict on the fraud count. *Id.* at 770 (*See* Supp. App. p. 26). Respondent's remaining motions were denied. *See generally, A&E Supply*, 612 F.Supp. at 765-67, 770-73 (Supp. App. pp. 16-23, 26-32). Petitioner moved for attorney's fees pursuant to Va. Code Section 38.1-32.1, which motion was denied. *Id.* at 777 (*See* Supp. App. p. 39). Petitioner made no other post trial motions. However, the District Court conditionally ordered a new trial on the unfair trade practices issue. *Id.* at 775 (*See* Supp. App. p. 36).

Respondent appealed to the United States Court of Appeals for the Fourth Circuit only the judgment awarding punitive damages.[2] Petitioner cross-appealed only as

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[2] Respondent consciously chose not to challenge the decision of the District Court directing a verdict for the policy proceeds. Consequently, the judgment for $221,035.88 for the breach of contract was not appealed and the sum, plus interest and costs, has been paid.

to whether the District Court committed error in granting respondent judgment notwithstanding the verdict on the fraud count, in refusing to permit petitioner to amend its Complaint in order to increase its claim for punitive damages, in rulings relating to the unfair trade practices count, and in the denial of attorney's fees. Petitioner did not cross-appeal the District Court's dismissal of the torts of libel and slander, trespass and intentional infliction of emotional distress as improperly pled. The Court of Appeals reversed the punitive damages award and entered final judgment for the respondent on the tort counts. *A&E Supply Co., Inc.* v. *Nationwide*, 798 F.2d 669, 678 (4th Cir. 1986) (*See* App. p. 19a). The Court of Appeals affirmed the granting of judgment notwithstanding the verdict on the fraud count, *Id.* at 672 (*See* App. pp. 7a, 8a), and held that there was no private right of action under the Virginia Unfair Claims Practices Act.[3] *Id.* at 676 (*See* App. p. 14a). The court remanded the question of attorney's fees for further consideration by the District Court. *Id.* at 671, n.1 (*See* App. p. 3a, n.1).

Petitioner then petitioned the Court of Appeals for a rehearing and asserted for the first time that the absence of an award of compensatory damages on the tort counts entitled petitioner, under Virginia law, to a remand on that issue and that a new trial should be allowed so that petitioner could proceed on the defamation claim, inclusion of which by the way of amendment was denied by the District Court. *A&E Supply*, 612 F.Supp. at 762 (*See* App. p. 9a). The petition was considered by the Court of Appeals and was denied. Order filed September 26, 1986 (App. p. 20a). Petitioner now seeks a Writ of Certiorari from this Court upon these issues.

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[3] Va. Code Section 38.1-49 *et seq.*

SUMMARY OF THE ARGUMENT

The Court of Appeals did not misapply *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) when it denied the Petition for Rehearing. When the Court of Appeals reversed the District Court's denial of judgment n.o.v. the new trial issues raised by the appellee, now petitioner, fell squarely within the discretion of the Court of Appeals. Based on the complete record before the Court of Appeals and its own experience with the case, it was in a position to dispose of the new trial ground on the slander claim without remand. Most importantly, under the circumstances, the fact that the slander claim was not litigated does not justify the award of a new trial. Since the slander claim was foreclosed by an adverse ruling by the District Court, the petitioner could not revive it when the Court of Appeals granted judgment n.o.v. to respondent without a cross-appeal. Petitioner cannot accomplish the revival of the slander claim by characterizing its motion as one for a new trial. The denial by the Court of Appeals of the Petition for Rehearing after granting judgment n.o.v. to respondent did not deny petitioner its Seventh Amendment right to trial by jury.

Furthermore, petitioner's argument that the Court of Appeals violated the holding of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) is clearly nothing more than an attempt to have this Court pass upon petitioner's novel interpretation of the Virginia law pertaining to punitive damages. Since there is nothing patently improper in the application of Virginia law by the Court of Appeals in this case, this issue does not rise to the level of importance so as warrant review by this Court.

ARGUMENT

I. THE COURT OF APPEALS IN DENYING THE PETITION FOR REHEARING AND DIRECTING THE DISTRICT COURT TO ENTER JUDGMENT FOR THE RESPONDENT WAS WELL WITHIN ITS JUDICIAL DISCRETION AND DID NOT MISAPPLY *NEELY* v. *MARTIN K. EBY CONSTRUCTION CO.* 386 U.S. 317 (1967).

Petitioner has failed to demonstrate any reason for this Court to exercise its discretion to review the denial by the Court of Appeals of petitioner's Petition for Rehearing and the request for new trial contained therein. Despite the suggestions by petitioner that this case presents an issue worthy of review, at the very best, the petition merely questions the exercise of discretion by the Court of Appeals in denying petitioner's request for a new trial on the separate slander claim. The Court of Appeals expressly stated in its Order that it considered the Petition for Rehearing and was of the opinion that it should be denied. *See* Order filed September 26, 1986, (App. pp. 20a, 21a). This petition does not involve a "misapplication" of *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) or a departure from the accepted course of proceedings which demands the supervision of this Court.

The decision in *Neely* makes it clear that Rule 50(d), Fed. R. Civ. P., is permissive in nature in its direction to the Court of Appeals in handling new trial requests by an appellee after reversing a district court's denial of appellant's motion for judgment n.o.v. The appellee, petitioner in this case, may assert grounds, if any, for new trial to the Court of Appeals in its brief or by petition for rehearing. *Neely*, 386 U.S. at 329. Rule 50(d) provides adequate opportunity for an appellee to present its

grounds for new trial to the Court of Appeals in the event its verdict is set aside by the Court of Appeals. *Id.*

Neely further makes it clear that the consideration of the new trial question "in the first instance" is lodged with the Court of Appeals. There is nothing in Rule 50 which indicates that the Court of Appeals in its discretion may not deny the request for new trial and direct the entry of judgment n.o.v. in favor of the appellant. *Neely*, 386 U.S. at 324. "[T]he Court of Appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

In the instant case, petitioner filed an extensive petition for rehearing setting forth its arguments for a new trial on the issue of slander. Due to the nature of the respondent's appeal and the petitioner's cross-appeal, the entire trial transcript was before the Court of Appeals by joint appendix which included rather lengthy District Court opinions detailing the rulings of the Court and the factual basis for them. *A&E Supply* v. *Nationwide*, 589 F.Supp. 428 (W.D. Va. 1984) and *A&E Supply* v. *Nationwide*, 612 F.Supp. 760 (W.D. Va. 1985) (*See* Supp. App.) In accordance with *Neely*, the petitioner had a full and adequate opportunity to present its grounds for a new trial to the Court of Appeals for decision.

The Court of Appeals may make final disposition of issues presented for new trial except those which in "its informed discretion" should be reserved for the trial court. *Neely*, 386 U.S. at 329. Although the petitioner takes issue with the denial of its new trial ground by the Court of Appeals, it does not argue or suggest that the circumstances are such that the District Court was in a better position to decide whether a new trial was

approprite as opposed to the Court of Appeals. The Court of Appeals reversed the District Court and directed judgment n.o.v. in favor of the respondent on the basis of matters of law. The circumstances surrounding the slander claim were fully contained in the record. The decision by the Court of Appeals did not involve errors in the application of an evidentiary standard which might give rise to questions of sufficiency of the evidence had the proper standard been applied. *See Neely*, 386 U.S. at 327-29 (indicating that there may be circumstances justifying a remand). Based on the full record before the Court of Appeals and its own experience with the case, the Court of Appeals was in a position to consider the grounds asserted for a new trial and dispose of same without the necessity of remanding to the District Court.

In any event, contrary to petitioner's argument, the separate cause of action of slander did not provide petitioner with a valid ground for a new trial. It was not an alternative theory or contention of liability which had not been litigated under circumstances justifying the award of a new trial to petitioner. The separate cause of action of slander as well as separate causes of action of intentional infliction of emotional distress and trespass were claims which were dismissed by the District Court in advance of trial as improperly pled. *A&E Supply*, 798 F.2d at 671, (*See* App. p. 4a); *A&E Supply*, 589 F.Supp. at 429 (*See* Supp. App. p. 1); *A&E Supply*, 612 F.Supp. at 761-62 (*See* Supp. App. p. 9). Petitioner filed suit against respondent in April of 1981 and did not seek or file an amended complaint until May of 1984. *A&E Supply*, 589 F.Supp. at 429-30 (*See* Supp. App. pp. 1 and 2). The District Court dismissed the claims because those torts were not supported by the facts alleged in the original complaint. *A&E Supply*, 612 F.Supp. at 761-62 (*See* Supp. App. p. 9).

Under the circumstances presented, this was merely a situation where an appellee failed to raise an error by cross-appeal when an appellant pursued an appeal from the District Court's denial of its motion for judgment n.o.v. Had petitioner filed a cross-appeal on this point, the Court of Appeals would have reviewed the District Court's ruling on the slander claim.

Notwithstanding petitioner's attempt to create a *Neely* issue, respondent suggests that this situation represents nothing more than petitioner's choice to abandon the slander claim or failure to cross-appeal the adverse ruling by the District Court. The District Court seemed to invite the petitioner to file a cross-appeal when it questioned its pre-trial ruling. *See A&E Supply*, 612 F.Supp. at 762 n.1 (Supp. App. p.9, n.1). Petitioner declined, preferring to pitch its appeal on the claims tried before the jury and on the verdict obtained. The Court of Appeals specifically noted the fact that the petitioner did not cross-appeal on those claims. 798 F.2d at 671 (App. p. 4a). Further, petitioner argues as a reason for review that the circumstances unfairly deprived it of the opportunity to have either the trial court or jury pass on the merits of its slander claim. However, it is clear that any such deprivation is a direct result of petitioner's failure to properly plead the slander claim and/or subsequent failure to cross-appeal from the District Court's adverse ruling.[4]

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[4] The petitioner only argues for new trial on the basis of slander not having been litigated but the District Court's ruling also precluded the assertion of separate torts of intentional infliction of emotional distress and trespass. *A&E Supply*, 798 F.2d at 671 (App. p. 4a). Of further interest, petitioner did cross-appeal the District Court's adverse rulings relating to attorneys' fees, *A&E Supply*, 798 F.2d at 671, n.3, (App. 5a), fraud, *Id.* at 672, (App. p. 4a and Petition for Certiorari p. 6, n.6), and its request to amend in order to increase the amount of punitive damages sought. *Id.* at 671, n.2 (App. 4a, n.2).

Petitioner, apparently recognizing this problem, argues that it could not appeal or cross-appeal from a decision awarding everything sought in the District Court citing *New York Telephone* v. *Maltbie*, 291 U.S. 645 (1934). However, the principle has no applicability in circumstances such as the instant case where there is an obligation to cross-appeal when the appellant notes an appeal in the first instance. W. Moore, 9 *Moore's Federal Practice*, ¶204.11(3), pp. 4-43-4-53 and cases cited therein. If *Maltbie* applies, the judicial economy served by the requirement of cross-appeal would be virtually eliminated.

It is well recognized that appeal from a final judgment draws into question all rulings of the court which preceded that judgment. *See Roth* v. *Hyer*, 142 F.2d 227 (5th Cir. 1944), *cert. denied*, 323 U.S. 712 (1944); *Aaro, Inc.* v. *Daewoo International*, 755 F.2d 1398, 1400 (11th Cir. 1985); 2 Fed. Pro. Law. Ed. Section 3-445. Accordingly, when respondent, as appellant, noted its appeal in this matter, it was incumbent upon petitioner in order to be in a postion to revive its separate claim of slander dismissed by the District Court to cross-appeal. *Morley Construction* v. *Maryland Cas. Co.*, 300 U.S. 185, 191 (1936); *Swarb* v. *Lennox*, 405 U.S. 191, 201 (1972), *reh. denied*, 405 U.S. 1049; *United Optical Workers' Union* v. *Sterling Optical*, 500 F.2d 220, 224 (2nd Cir. 1974); *Stella* v. *DePaul Community Health Center Inc.*, 642 F.2d 258, 261 (8th Cir. 1981); *NLRB* v. *International Van Lines*, 409 U.S. 48 (1972).

Petitioner does not fall under the exception recognized in *Morley*, 300 U.S. at 191 and in subsequent cases, which allows an appellee, without filing a cross-appeal, *to support a judgment* awarded in the District Court with matters appearing in the record. Here, petitioner seeks *to*

attack the judgment of the District Court dismissing its separate claim of slander as improperly pled in order to enlarge its own rights. It has been recognized by this Court that an appellee, without filing a cross-appeal, may not defend the sum of a money judgment by asserting error in the District Court which, if corrected, might entitle it to a sum equal to or more than the amount of the judgment. If an appellee wishes to argue error of the District Court in denying a claim, it must file a cross-appeal. *Helvering* v. *Pfieffer*, 302 U.S. 247 (1937); *Alexander* v. *Cosden Pipeline Co.*, 290 U.S. 484 (1933); W. Moore, 9 *Moore's Federal Practice*, ¶204.11(3), pp. 4-46, 4-47, nn. 16 and 17.

Under these circumstances which were clearly presented to the Court of Appeals in the record, it could properly exercise its discretion in refusing to allow petitioner to re-open the matter pertaining to slander by cross-appeal or by seeking a new trial.[5] Petitioner failed to cross-appeal on the point. It could not seek the same relief by characterizing its motion as one for a new trial. Petitioner has received its proceeds under the policy as awarded by the jury. *A&E Supply*, 798 F.2d at 671 (*See* App. p. 5a). The Court of Appeals has rejected its attempts to recover punitive damages in this case. This disposition was within its discretion.

Finally, petitioner claims that the reversal of the District Court's denial of judgment n.o.v. and entry of judg-

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[5] In any event, it appears that the potential slander claim would have been barred by the applicable statute of limitations. *See Schoonfield* v. *Mayor and City Council of Baltimore*, 399 F.Supp. 1068, 1090 (D.Md. 1975), *aff'd.*, 544 F.2d 515 (4th Cir. 1976); *Also see Morrissey* v. *William Morrow & Co.*, 739 F.2d 962, 967 (4th Cir. 1984), *cert. denied*, 496 U.S. 1217 (1985) (recognizing Virginia's one year statute of limitation for defamation).

ment n.o.v. in favor of the respondent denied petitioner its Seventh Amendment right to trial by jury. (Petition for Certiorari at pp. 10-12). This contention is dismissed in *Neely*. 386 U.S. 317, 321-22. There is no constitutional bar to an appellate court directing the entry of judgment n.o.v. on appeal. *Id.*

II. THERE WAS NO VIOLATION OF THE *ERIE* DOCTRINE BY THE COURT OF APPEALS WHEN IT CHOSE NOT TO REMAND THIS CASE FOR A NEW TRIAL ON THE ISSUE OF CONVERSION.

A. The Court Of Appeals Correctly Concluded That Virginia Law Requires An Award Of Compensatory Damages As An Indispensible Prerequisite To An Award Of Punitive Damages.

Petitioner's conclusory statement that Virginia law does not require an award of compensatory damages before an award of punitive damages is permissible, and that the Court of Appeals violated the holding of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) when it imposed such a requirement, (Petition for Certiorari at 13), is simply without the support of the Virginia authorities. Indeed, the Virginia Supreme Court has passed upon the question on numerous occasions and has concluded that, as a general rule, "an *award* of compensatory damages . . . is an *indispensible predicate* for an award of punitive damages." *Gasque* v. *Mooer's Motor Car Co.*, 227 Va. 154, 159, 313 S.E.2d 384, 388 (1984) (emphasis added); *see also Valley Acceptance Corp.* v. *Glasby*, 230 Va. 422, 433, 337 S.E.2d 291, 297 (1985) (where "neither compensatory damages nor nominal damages were *awarded* . . . punitive damages could not be awarded") (emphasis added); *Fleming* v. *Moore*, 221 Va. 884, 893-94, 275 S.E.2d 632, 638 (1981) ("in conformity with the general rule in tort actions, no punitive

damages may be awarded for slander or libel *unless compensatory damages are awarded*") (emphasis added); *Newspaper Publishing Corp.* v. *Burke*, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976) ("the general rule in tort cases requires an *award of actual damages* as a prerequisite to an award of punitive damages") (emphasis added). The only instances under Virginia law where compensatory damages need not be awarded before punitive damages are recoverable are cases involving defamation *per se*. *Fleming* v. *Moore*, 221 Va. at 894, 275 S.E.2d at 638; *Burke*, 216 Va. at 805, 224 S.E.2d at 136. Since petitioner's argument that it is entitled to punitive damages is based upon the tort of conversion, the punitive damages award, unsupported by an award of compensatory damages, was fatally defective under Virginia law.

Petitioner relies upon *Zedd* v. *Jenkins*, 194 Va. 704, 74 S.E.2d 791 (1953) to support its argument on this issue. However, for two crucially important reasons, it is clear that this reliance is misplaced. First, petitioner argues that the language of *Zedd* permits a recovery of punitive damages to be based upon a "finding," as opposed to an "award," of compensatory damages. (Petition for Certiorari at 14). According to petitioner, this means that an actual monetary award of compensatory damages by the jury is not required. *Id.* However, this is contrary to the very language in that opinion. The Virginia Supreme Court specifically noted that the evidence in *Zedd* was "sufficient to sustain a verdict awarding plaintiff a reasonable sum for actual damages." *Id.* at 708, 74 S.E.2d at 793. Thus, under petitioner's interpretation there was a "finding" of entitlement to compensatory or actual damages. However, the court held that a plaintiff could not maintain an action for punitive damages only, *Id.* at 706, 74 S.E. 2d at 793, and that an award of punitive damages only, even

though accompanied by such evidence of actual damage, was illegal under Virginia law. *Id.* at 708, 74 S.E.2d at 793. Furthermore, the court instructed the jury that punitive damages were recoverable only if the jury first awarded compensatory damages. *Id.* at 707, 74 S.E.2d at 793, n.1. Since there was no actual monetary award of either compensatory or nominal damages, the court in *Zedd* held, in direct contrast to petitioner's argument, that there was no "finding" of compensatory or nominal damages and therefore the award of punitive damages could not stand. *Id.* at 708, 74 S.E.2d at 793. Ever since it was decided, *Zedd* has been interpreted as requiring the very opposite result from that which petitioner now urges. *See, e.g.*, *Durham* v. *New Amsterdam Casualty Co.*, 208 F.2d 342, 345 (4th Cir. 1953); *Valley Acceptance Corp.* v. *Glasby*, 230 Va. at 433, 337 S.E.2d at 297; *Newspaper Publishing Corp.* v. *Burke*, 216 Va. at 805, 224 S.E.2d at 136.

Second, Petitioner's attempt to analogize the present factual situation with the facts of *Zedd* fails. Petitioner argues that it presented at trial sufficient evidence to warrant a "finding" of entitlement to compensatory damages by the jury. (Petition for Certiorari at 13). However, it is quite clear from reading the opinion of the Court of Appeals that the court concluded that not only did petitioner fail to receive an actual award of compensatory damages, but also that plaintiff failed to prove that it was entitled to any such damages. The Court of Appeals specifically found, as a matter of law, that petitioner failed to present the necessary evidence that the dispossession in question "involved a palpable loss." *A&E Supply*, 798 F.2d at 673, (*See* App. p. 8a). The court further noted that the only damages which petitioner proved at the trial below were damages for breach of contract. *Id.* The court correctly concluded that such consequential damages for

breach of contract could not support an award of punitive damages for conversion. *A&E Supply*, 798 F.2d at 673, (*See* App. pp. 8a, 9a). Therefore, contrary to petitioner's arguments, not only did petitioner fail to receive an award of compensatory damages in order to support its award of punitive damages, it also failed to prove that it was entitled to any such award of compensatory damages in the first place. Even if petitioner's construction of the opinion of the Virginia Supreme Court in *Zedd* is somehow correct, petitioner is nevertheless still not entitled to punitive damages because it failed to prove that it suffered any loss as a proximate result of the tort.

Petitioner next relies upon the case of *Peacock Buick* v. *Durkin*, 221 Va. 1133, 277 S.E.2d 225 (1981) to support its position. (Petition for Certiorari at 13 and nn. 14 and 15). Petitioner argues that the Virginia Supreme Court in that case approved a jury instruction which permitted a verdict for punitive damages without an actual award of compensatory damages. *Id.* However, it is apparent that petitioner has examined only one small portion of just one of the jury instructions cited by the court and has assigned to it a significance which is completely unwarranted. When read as a whole the jury instructions at issue in the *Peacock Buick* case clearly informed the jury that punitive damages were something which it could award "in addition to compensatory damages." *Peacock Buick* v. *Durkin*, 221 Va. at 1137, 277 S.E.2d at 227, n.3. Furthermore, compensatory damages were actually awarded to the plaintiff in *Peacock Buick* and the Virignia Supreme Court never directly addressed the question of whether an award of compensatory damages was a necessary prerequisite to an award of punitive damages. However, in those cases where the court has directly addressed that question, it has, as pointed out above,

answered the question in the affirmative. Indeed, petitioner has not pointed to a single case in which only punitive damages were awarded for anything other than the tort of defamation *per se*.

The Court of Appeals, in concluding that an award of punitive damages only, without an underlying award of compensatory damages, was illegal under Virginia law, rendered a decision in accordance with and pursuant to Virginia law. Consequently, there was no violation of the *Erie* doctrine. Petitioner's argument to the contrary is nothing more than a thinly disguised attempt to bring a marginally debatable question of Virginia law within the purview of Rule 17 of Rules of the Supreme Court of the United States. Clearly, this attempt must fail.

B. The Decision Of The Court Of Appeals To Enter Final Judgment In Favor Of The Defendant Was Consistent With Virginia Law.

Petitioner argues, again based upon *Zedd* v. *Jenkins*, 194 Va. 704, 74 S.E.2d 791, that had the present case been tried in state court, petitioner would have been "entitled" to a remand on the issue of conversion in order to clarify the "ambiguity" created in the verdict by the jury's award of punitive damages only. (Petition for Certiorari at 14). However, it is clear that the decision not to remand is entirely consistent with Virginia law. If the Court of Appeals did not actually apply the Virginia law on this issue, it is quite clear that the court's application of federal law brought about a result so substantially similar to that which would have followed in state court that there was no violation of the *Erie* doctrine. *See Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945).

The Virginia Supreme Court held in *Zedd* that remand in that case was proper pursuant to Va. Code Section

8-493 (1950). *Zedd* v. *Jenkins*, 194 Va. at 708, 74 S.E.2d at 793-94. That code provision, which exist today and existed at the time of this appeal to the Court of Appeals as Va. Code Section 8.01-681, provides that a remand is proper under Virginia law "when the ends of justice require it." Va. Code section 8.01-681. The court no doubt determined that "the ends of justice" required a remand in *Zedd*. However, that decision was made not only because the jury returned a verdict for punitive damages only, but also because the trial judge committed reversible error in instructing the jury foreman to delete the words "for punitive damages only" from the verdict. *Id.* at 707, 74 S.E.2d at 793. Such action by the trial judge created an ambiguity which made it impossible to determine whether a true verdict had been rendered. *Id.* In the present case, if an "ambiguity" indeed exists, it was brought about solely by the petitioner's failure to even ask for compensatory damages for the alleged conversion. Since the District Court committed no improper act which gave rise to an ambiguous verdict, *Zedd* does not require a remand in the present case.

Furthermore, had this case been litigated in state court and the Virginia Supreme Court had confronted the issue of remand, that issue would have been determined in accordance with the following statement of that court:

> The question of whether final judgment should be entered or the case remanded for trial *de novo*, or upon designated questions or points, lies largely in our discretion, and depends upon the facts and circumstances of the case. Before entering final judgment, it should be reasonably apparent that the case has been fully developed in the trial court, or at least, that the parties had a fair opportunity of so developing the case, and we must be of the opinion that, upon the facts before us, the parties have had a fair trial on

> the merits of the case, and that substantial justice has been reached.

Kearns v. *Hall*, 197 Va. 736, 744, 91 S.E.2d 648, 653-54 (1956). There is no doubt that the petitioner had a fair opportunity to try its case in the District Court. Again, the primary reason no compensatory damages were awarded is the fact that petitioner sustained no compensable loss and never asked the court or the jury for such relief. It certainly cannot be said that the Court of Appeals violated the above guidelines or abused its discretion when it chose to enter final judgment in favor of the respondent.

Finally, any doubt as to whether petitioner was guaranteed or entitled to a remand under Virginia law is erased by the decision of the Virginia Supreme Court in *Valley Acceptance Corp.* v. *Glasby*, 230 Va. 422, 337 S.E.2d 291 (1985), which was rendered during the pendency of the appeal of this case to the Court of Appeals. In *Valley Acceptance*, the court held that a punitive damages award was improper absent an award of compensatory or nominal damages and reversed the judgment in favor of the plaintiffs on the issue of punitive damages. Significantly, no remand was ordered. Indeed, no remand was ordered despite the court's observation that the evidence revealed "wrongdoing" on the part of the defendant, *Id.* at 433, 337 S.E.2d at 297, and that the plaintiffs had incurred some pecuniary loss as a result of this wrongdoing. *Id.* at 425-26, 337 S.E.2d at 293. Obviously, the Virginia Supreme Court in that case concluded that "the ends of justice" did not require a remand under those facts. There is no reason to believe that the same court would not have reached the same conclusion in this case.

C. The Court Of Appeals Correctly Concluded That Petitioner Failed To Present At Trial Evidence Sufficient To Support A Judgment For Punitive Damages Based Upon The Tort Of Conversion.

Finally, it is apparent that the petitioner has incorrectly assumed that the Court of Appeals determined that the evidence on the issue of conversion was sufficient to establish actual malice on the part of the respondent so as to otherwise entitle the petitioner to punitive damages. However, it is quite clear that the Court of Appeals determined that the award of punitive damages was improper not only because of the absence of an award of compensatory damages, *A&E Supply*, 798 F.2d at 673 (*See* App. p. 8a), but also because the evidence at trial was insufficient to establish liability for punitive damages. *Id.* at 673 (*See* App. p. 9a). Specifically, the Court of Appeals observed:

> Nationwide did not refuse to return the A&E records until April 29, 1981, more than six weeks after Nationwide had formally rejected the insurance claim. The wrongful retention of property was not factually bound to the breach [of contract] but to the efforts of Nationwide to prove its position in the ensuing litigation. A&E did not request the return of documents until it had initiated suit. It would undermine the rule of *Kamlar Corp.* v. *Haley* [224 Va. 699, 299 S.E.2d 514] if subsequent disputes over evidence were to translate into the tort of conversion *sufficient to support a punitive damages award* in an action for contractual breach.

A&E Supply, 798 F.2d at 673 (*See* App. pp. 8a, 9a) (Emphasis added).

Therefore, irrespective of whether the Court of Appeals applied the correct Virginia law on the issue of whether an award of compensatory damages must be

made in order to support an award of punitive damages, the court correctly concluded that punitive damages were not warranted by the facts of this case. Since punitive damages were not recoverable on the evidence presented, there could be no violation of the *Erie* doctrine on the grounds asserted by petitioner.

CONCLUSION

Petitioner has failed to support its contention that this case presents sufficiently important questions which warrant the review of this Court. Upon close examination it is clear that petitioner's claim that the Court of Appeals misapplied *Neely* v. *Martin K. Eby Construction Co..*, 386 U.S. 317 (1967) is illusory. Furthermore, it is equally apparent that the Court of Appeals fully complied with the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) when it entered final judgment in favor of the respondent on the issue of conversion. Indeed, the relief sought by petitioner in this Petition for Certiorari would result in and not prevent a violation of both *Neely* and *Erie*. Therefore, respondent respectfully moves this Court to deny the Petition for Certiorari.

Respectfully submitted,

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